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In the

Supreme Court of the United States

OCTOBER TERM, 1946

No. 1363 87

ORSEL McGHEE and MINNIE S. McGHEE, his wife,
Petitioners,

vs.

BENJAMIN J. SIPES and ANNA C. SIPES, et al.,
Respondents

BRIEF FOR ~~DEFENDANTS~~ RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATUTE

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STATEMENT OF THE CASE

Petitioners statement of facts is substantially correct except:

(a) It should be noted that the deed by which petitioners acquired title, dated November 30, 1944, was made and accepted, "*Subject to existing restrictions as of record*" (R. 67), and the restriction in question was recorded September 7, 1935 (R. 63).

(b) The statement that "Similar agreements were executed on forty-nine lots * * * within the subdivision in which the lot * * * is located" (Petitioners' brief, page 4, line 3) is incorrect. The word, "subdivision," should be "block" (R. 53). The block is a single city block, which, on both sides of the street has 53 lots (R. 53, 54, 30). Under Wayne County Circuit Court Rule 14 (b), a synopsis of public records submitted as a pre-trial statement is admissible in evidence as admitted facts except insofar as its inaccuracy shall be pointed out under oath. This block is located in a large white residential area with restrictions uniform as to all properties subject thereto.

ARGUMENT

I.

NO CONSTITUTIONAL OR OTHER FEDERAL QUESTION OF SUBSTANCE IS PRESENTED

The restrictive agreement involved in this case does not affect sale or ownership. It relates only to use and occupancy (R. 63). It is a private contract, between private individuals, regarding their own private property (R. 58-63). The property was so restricted when purchased by petitioners and their deed conveyed it to them "subject to existing restrictions as of record" (R. 67).

In *Corrigan v. Buckley*, 271 U. S. 323, this court was asked to rule unconstitutional a racial restrictive covenant similar in legal effect to the one here involved for the same reasons that petitioners now urge upon the court. This court there said, on pages 329-330:

> "Under the pleadings in the present case the only constitutional question involved was that arising under the assertions in the motions to dismiss that the indenture or covenant which is the basis of the bill, is 'void' in that it is contrary to and forbidden by the 5th, 13th and 14th Amendments. This contention is entirely lacking in substance or color of merit. * * * It is obvious that none of these Amendments prohibited private individuals from entering into contracts respecting the control and disposition of their own property; and there is no color whatever for the contention that they rendered the indenture void."

Since 1926, when the Corrigan case was decided, this court has on several occasions refused to grant certiorari in similar cases.

Mays v. Burgess, 152 F. 2nd 123.
Certiorari denied, 325 U. S. 868.
Grady v. Garland, 89 F. 2nd 817.
Certiorari denied, 302 U. S. 694.
Cornish v. O'Donoghue, 30 F. 2nd 983.
Certiorari denied, 279 U. S. 871.
Russell v. Wallace, 30 F. 2nd 981.
Certiorari denied, 279 U. S. 871.

Neither is there any diversity of opinion on this point as every court of last resort in the United States to which this question has ever been submitted has ruled that racial restrictions against use and occupancy are not unconstitutional.

Corrigan v. Buckley, 271 U. S. 323; 46 S. C. 521, 70 L. Ed. 969.
Wyatt v. Adair, 215 Ala. 365, 110 So. 801.
Wayt v. Patee, 205 Cal. 46, 269 Pac. 660.
Shindler v. Roberts, 69 Cal. App. 2nd 549, 160 Pac. 2nd 65.
Stewart v. Cronin, 105 Colo. 392, 98 Pac. 2nd 999.
Chandler v. Ziegler, 88 Colo. 5, 291 Pac. 822.
United Coop, etc. v. Hawkins, 269 Ky. 563, 108 S. W. 2nd 507.
Queensborough Land Co. v. Cazeaux, 136 La. 724, 67 So. 641.
Meade v. Denistone, 173 Md. 295, 196 Atl. 330.
Parmalee v. Morris, 218 Mich. 625.
Schulte v. Starks, 238 Mich. 102.
Porter v. Pryor, Mo. 1942, 164 S. W. 2nd 353.
Koehler v. Rowland, 275 Mo. 573, 205 S. W. 217.
Thornhill v. Herdt, Mo. App. 1939, 130 S. W. 2nd 175.
Ridgeway v. Cockburn, 296 N. Y. Sup. 963.

Lyons v. Wallen, 191 Okla. 567, 133 Pac. 2nd 555.
Doherty v. Rice, 240 Wis. 389, 3 N. W. 2nd 734.
Dooley v. Savannah Bank & Trust Co., 199 Ga. 353; 34 S. E. 2nd 522.
Lions Head Lake Co. v. Brzezinski (N. J.), 43 Atl. 2nd 729.

And by dictum:

Clark v. Vaughn, 131 Kan. 438, 292 Pac. 783.
Eason v. Buffalo, 198 N. C. 520, 152 S. E. 496.
White v. White, 108 W. Va. 128, 150 S. E. 531.
Burke v. Kleiman, 277 Ill. App. 519.

For complete digest see note to:

Mays v. Burgess, 162 A. L. R. 180.

II.

JUDICIAL ENFORCEMENT OF A VALID PRIVATE AGREEMENT DOES NOT VIOLATE THE CONSTITUTION

Petitioners urge that the courts cannot enforce such restrictive agreements, because the Judiciary is a branch of the Government, and cite in support of the proposition the case of *Buchanan v. Warley*, 245 U. S. 60, a case involving an ordinance of the City of Louisville, Kentucky, requiring segregation of the races. We quote the portion of the opinion which states the issue:

> "The concrete question here is: May the occupancy, and, necessarily, the purchase and sale of property of which occupancy is an incident, be inhibited by the State, or by one of its municipalities, solely because of the color of the proposed occupant of the premises?"

It seems too obvious to require argument that cases involving the enforcement of an ordinance or a law bear no legal resemblance to cases enforcing a private contract.

The obligations imposed on parties by their own contracts would, if imposed upon them by statute, be clearly unconstitutional in the vast majority of cases. No court would enforce a statute requiring A to sell his house to B, yet the courts without question enforce A's contract to sell his house to B.

When the court enforces a law, whether it be legislative law, judge made law or common law, the effect is to control the actions of the individual without regard to his personal consent. But when a court enforces a contract, the indispensable prerequisite is the individual's voluntary agreement, either express or implied, to do that which the court decrees he shall do.

Petitioners' contention is not new. It was considered in *Corrigan v. Buckley,* at page 331, where the court said:

> "And while it was further urged in this court that the decrees of the courts below in themselves deprived the defendants of their liberty and property without due process of law * * * it was not raised by the petition for the appeal or by any assignment of error either in the court of appeals or in this court; and it likewise was lacking in substance."

This final clause may be dictum but it is a clear cut expression of this court's opinion that the contention is lacking in substance.

The claim, that judicial enforcement of the restriction violates the Constitution fails if it be conceded, as it must be under the ruling in *Corrigan v. Buckley,* that the restriction is a valid contract and not unconstitutional.

Petitioners, in their briefs filed in the Michigan Supreme Court, conceded its validity, saying: "The discriminatory agreements * * * that exclude negroes * * * from buying or occupying residential property, so long as they remain purely private agreements, are not unconstitutional." (Graves and Dent brief, pages 45-46.) "We do not argue that the contract itself violates the Constitution." (Marshall, Robinson and Perry brief, page 10.)

We have examined all the cases cited in petitioners' brief and none of them involves the constitutionality of a private contract, excepting *Corrigan v. Buckley*. Petitioners have not cited and cannot cite one case where any court of last resort in the United States has ever held that the enforcement of a valid contract was State action prohibited by the Constitution or any of its Amendments.

III.

THE PUBLIC POLICY OF THE UNITED STATES

Jurisdiction of this court is invoked under Section 237 of the Judicial Code as amended (28 U. S. Code 344-b). The applicable parts of that section read:

> "It shall be competent for the Supreme Court by certiorari to require that there be certified to it for review * * * any cause wherein * * * any title, right, privilege or immunity is specially set up or claimed by either party under the Constitution, or any treaty or status of or commission held or authority exercised under the United States."

Petitioners fail to show jurisdiction within the terms of this section in that their claim is based on "public policy," which is not mentioned in the statute.

Further than this, no claim under the public policy of the United States was made or specifically set up in the Michi-

gan courts, nor was such claim passed upon by them. We have searched petitioners' brief in vain for any reference to the record where the public policy of the United States is mentioned and contend it is not properly before this court.

But if it were properly before the court it would avail petitioners nothing because in *Corrigan v. Buckley*, 271 U. S. 323, near the bottom of page 330, this court said:

> "And, plainly • • • the contention, earnestly pressed, that the indenture is void as being 'against public policy,' does not involve a constitutional question within the meaning of the Code provision."

The sociological problems argued under Section II-B of petitioners' brief are not mentioned in the pleadings, were not raised on the trial, were not urged by petitioners in the Michigan Supreme Court (raised only by *Amicus Curiae*), and the alleged facts (statistics) on which they are based were not offered in evidence. In short, these matters are no part of the record and are not properly before this court.

IV.

THE DECISION OF THE MICHIGAN COURT IS CORRECT AND IN ACCORD WITH THE DECISIONS OF THIS COURT AND OF ALL OTHER STATE SUPREME COURTS

The decision of the Supreme Court of Michigan conforms to the settled rule of property which has existed in Michigan during most of the life of the State (Opinion of Michigan Supreme Court in this case, R. 92). It is also in agreement with settled rules of property in the District of Columbia and every State of the Union in which the question has ever been submitted to the courts (citations on pages 4 and 5 of this brief).

If petitioners feel that Michigan's public policy as expressed in this and former decisions of her Supreme Court ought to be changed, their arguments should be addressed to the Michigan legislature. They are clearly asking this Court, by judicial decision, to change a well established local rule of property; to legislate instead of adjudicate.

For the foregoing reasons it is respectfully submitted that the petition for certiorari should be denied.

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